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# **RECHT, FREEDOM, AND THE HIGHEST POLITICAL GOOD IN KANT**

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*Please note that this is an early draft. Comments are very welcome, [cr@ifs.ku.dk](mailto:cr@ifs.ku.dk)*

1

Towards the end of "The Doctrine of Right", Kant writes that perpetual peace is "the entire final end of the doctrine of right" and "the highest political good" (MM 6: 355). It is not difficult to recognize that the absence of war should be a great political good and a precondition for individuals enjoying their rights. However, Kant has a unique understanding of peace, right, and their relationship that indicates a deeper insight than pointing out the instrumental relationship between absence of hostilities and well-functioning legal institutions.<sup>1</sup> This insight in Kant is bound up with the suggestion that peace is a juridical idea, or an *idea of Right*, as distinct from both an empirical concept and an ethical idea. Moreover, the notion of peace as the final end of the doctrine of right is connected to Kant's idea that "the general concept of public right" is composed of three levels – domestic, international, and cosmopolitan right (MM 6: 311). For Kant, the three levels of public right are all necessary and form an integrated *system*.<sup>2</sup> However, it is not clear exactly what end this system serves, and if and how Kant manages to integrate the system in a satisfactory manner.

2

The main challenge is that Kant's system of public right involves two entities with moral personality, namely natural persons and states. The three-level system of domestic, international, and cosmopolitan right presupposes that states have legal and moral personality. By definition, there can be no international right without nations or states.<sup>3</sup> Next, states to be states and secure the rights of their subjects must be sovereign, according to Kant. However, the very idea of public right involves an idea of legal, that is enforceable, duties, and thus there can be no international and cosmopolitan right if states are sovereign –for a sovereign has only rights and no legal duties (MM 6: 319). Moreover, in this layered system with

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<sup>1</sup> At PP 8: 343 Kant famously distinguishes peace and "suspension of hostilities."

<sup>2</sup> Byrd and Hruschka 2010, 188; Flikschuh 2010, 470-1; Williams 2014, 10, 14.

<sup>3</sup> Kant uses "nation" and "state" synonymously [REF].

different moral entities, individuals and states, it becomes unclear what the exact end of public right is. In the "Introduction to The Doctrine of Right", it is quite clear that the end of right is the freedom and equality *of individuals*. Thus, as a system, one would expect public right at all three levels to be defended, by Kant, as a system of equal freedom of individual persons. However, when we move to international right, it seems Kant is committed, rather, to a system of equal freedom *for states*. The juridical notion of peace here connotes the condition in which conflicts between states are arbitrated by law rather than decided by force. But if peace were solely about legal adjudication between states with given jurisdictions and territories, this would make the connection between the right of individual persons and peace indirect and empirical rather than direct and categorical (moral). Moreover, it is unclear where cosmopolitan right fits into this division.

3

There can be no doubt that Kant himself was struggling to make the three different levels of right fit into one coherent system. This is most evident in his indecisiveness or ambivalence between a state of nations (*Völkerstaat*) with public laws and coercive force and a voluntary league of nations (*Völkerforbund*).<sup>4</sup> His troubles here are not merely empirical but normative and conceptual. I shall not focus on Kant's ambivalence regarding global institutions but take us one step back to the very meaning and foundation of Right in Kant. Specifically to the idea that Right "proceeds *entirely* from the concept of *freedom* in the external relation of people to one another," as he puts it in "Theory and Practice" (TP, 8: 289, first emphasis added). Can all three levels of public right be derived from a notion of equal freedom between individual persons? Is that what Kant does or attempts to do? I ask these questions, of course, because of a nagging doubt about whether a defense of states' rights can be directly (that is, non-instrumentally) based on Kant's notion of external freedom of individuals under universal law. Moreover, Kant's argument would lack coherence or unity, if the three levels of public right were based on different principles or even have different functions.<sup>5</sup> For Kant has only one principle of right, one universal principle of right, and this concerns the equal freedom *of individual persons* (MM 6: 230). And there is only one innate right of humanity, which again belongs to persons in virtue of their humanity, and not to states (MM 6: 237). For Kant's system of Right to have unity and coherence, perpetual peace must have a direct – that is, non-instrumental and categorical – relation to the equal freedom of individual persons. Only in this way can it be "the entire final end of the doctrine of right."

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<sup>4</sup> Byrd and Hruschka 2010, 198-200. [Kant REF]

<sup>5</sup> Flikschuh (2019, 475-6) suggests that the three different levels of right have different functions and deal with different types of moral agents.

## Peace as an Idea of *Recht*

4

I begin from the fact that Kant regards peace as a matter of Right, rather than of ethics: "This rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all nations that can come into relations affecting one another is not a philanthropic (ethical) principle but a *juridical* principle [ein *rechtliches* Prinzip]" (MM 6: 352).<sup>6</sup> A juridical principle is a principle for the public and positive legal ordering of external relations between persons, rather than a principle persons must make the motive of their actions (MM 6: 213-14, 218-21). Insofar as peace relates to the community of all nations, to speak of it as a juridical principle or a principle of right indicates that it is a principle for the right ordering of a global public legal order. Moreover, to speak of peace in terms of Right means that it is a condition that must be *established* by agreement and one that must provide *assurance* of compliance to the parties. Peace cannot merely be based on good will or sympathy; it requires the rules and assurance provided by a lawful condition (PP 8: 349).

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To assess to what extent and how Kant regards the international and cosmopolitan levels as part of the same system of public right as the domestic level, consider his understanding of public right. "The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is public right. Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for *a multitude of peoples*, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right" (MM 6: 311, emphases changed). Central to public right are public and positive laws, and a common will under which people – or peoples – affecting one another are subjected. Note that already in his definition of public right, Kant includes the international level. Moreover, and crucially, coercion is *internal* to the very concept of Right. Indeed, "Right and authorization to use coercion ... mean one and the same thing" (MM 6: 232).

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Right, in Kant, however, is not merely an empirical description of positive law. The reason why Right is internally connected to coercion is that equal external freedom is possible only if those who infringe on the equal freedom of others are hindered in

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<sup>6</sup> In Gregor's translation: "... a principle *having to do with rights*".

doing so by coercive laws, "as a *hindering of a hindrance to freedom*" (MM 6: 231). As mentioned above, the equal external freedom of persons is the normative principle from which Kant claims to derive his notion of Right. Thus, he posits The Universal Principle of Right (UPR): "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (MM, 6: 230). Note that the UPR is not directed to the individual, in the same way that the categorical imperative is, but is a principle for the right ordering of the public legal order.<sup>7</sup>

7

Reading the "Introduction to The Doctrine of Right," we are presented with something that looks like universal moral individualism, that is, a position according to which individual human beings have ultimate value. In this form of individualism, collective entities such as states can have value only from their value to individual human beings.<sup>8</sup> Thus, in the Introduction, Right is defined as a relation between individual choices under universal law (MM 6: 230), and the Universal Principle of Right mentions only individual persons. Moreover, there is only one innate right, and it belongs to the individual person: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right *belonging to every man by virtue of his humanity*" (MM, 6: 237, emphasis changed). The question is how we get from this moral individualism of freedom to an idea of a morality of sovereign states, if that is indeed what Kant does.<sup>9</sup> Can we construct a unified and coherent system of Right with three different levels that realizes the UPR and freedom as independence, *and* respects state sovereignty?

## The State

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Kant arrives at the idea of the sovereign state as the precondition for the realization of UPR and freedom as independence. The sovereign state solves two problems in the state of nature, the problem of unilateral determination of rights and the problem of assurance. The state provides procedures for establishing a common

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<sup>7</sup> [cf Pogge and JOP].

<sup>8</sup> For a definition of value individualism, see Altman & Wellman 2008, 285 and their ref.s, esp. Beitz.

<sup>9</sup> Flikschuh (2010, 469-70) argues that Kant is *not* committed to universal moral individualism but to a morality of sovereign states.

will, which can lay down what is right, and which has the power to assure everyone subject to it of the security of their rights. For Kant this is particularly important in relation to property rights, which have a conventional element and can be enforced in accordance with freedom as independence only by a common will, which has no purposes of its own. If property rights were enforced by a unilateral will, some would be subject to the will or purposes of another (MM 6: 256). Moreover, for Kant, in order for the state to be a state, the ruler must be sovereign and have no legal duties to his subjects "that he can be coerced to fulfill" (MM 6: 319). Kant introduces in this connection a distinction between provisional rights and conclusive rights. In the state of nature, individuals may have provisional rights to property "in anticipation and preparation for the civil condition" but these rights are only made conclusive by the common and coercive will of the state (MM 6: 257).

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It is worth here to pause and consider more specifically what Kant takes to be conclusive possession. More precisely, we may ask if an individual state on its own, with no regard to other states and their subjects, conclusively can determine the rights of its citizens, specifically their property rights. Thus, in the paragraph just quoted, Kant writes, "possession found in an *actual* civil condition would be *conclusive* possession" (MM 6: 257). First, it is important to note that Kant is not making a purely empirical argument of the Hobbesian kind, which says that only under the sword of the sovereign is the property of the subjects secure. For Kant, the civil condition solves a moral and not merely an empirical problem.<sup>10</sup> That is, it solves the problem not only of establishing and monopolizing sufficient power to secure property and hold down conflict, but also the moral problem of securing the *principle* that no one be the subject to the unilateral will of another. Thus, if the notion of conclusive possession is to fit into Kant's normative conception of Right, it must fulfill the normative criterion presented in the UPR, as well as realize the innate right to freedom as independence.

10

Second, if an individual state on its own can secure the rights of its subjects conclusively, it is unclear why Kant regards the two other levels of Right, international and cosmopolitan Right, as part of *the same* general concept of Right. Alternatively, we would have the possibility that these further levels of Right were needed for merely instrumental reasons, for example, that peace would be a mere empirical means to protect the individual states' capacity to uphold their internal rightful condition. But this would make naught of Kant's claim that "universal and

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<sup>10</sup> Ripstein 2009, 164; Rostbøll 2015, 55.

lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of mere reason" (MM 6: 355). In the same section, Kant clearly sees peace in normative and categorical terms, *and* as a condition for conclusiveness of property rights. Thus, he continues: "the condition of peace is alone that condition in which *what is mine and what is yours for a multitude of human beings* is secured under *laws* living under proximity to one another, hence those who are united under a constitution ... [the rules of which are] derived a priori by reason from the ideal of a rightful association of human beings under public laws as such" (MM 6: 355, first emphasis added).

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We are here back to the individualist basis of Right presented in the "Introduction to The Doctrine of Right," which is the only ideal for a rightful association of human beings under public laws that Kant spells out. However, Kant clearly does not present us with a system of cosmopolitan right based solely on the moral personality of individual human beings, as many contemporary cosmopolitans do. In Kant's system of Right, there has to be room also for sovereign states.<sup>11</sup> The reason for this, I submit, is that Kant's cosmopolitanism from the outset is a cosmopolitanism *of Right* and not one that derives legal cosmopolitanism (a concrete political ideal of a global legal order affording all human beings equal rights and duties) from moral cosmopolitanism (the idea of the equal moral worth of all human being).<sup>12</sup>

12

Thus, before reaching the international and cosmopolitan levels, Kant has made the argument that a public legal order in the form of the sovereign state is a precondition of securing individual rights. In addition, he seems to have committed himself to the view that the sovereign state is not merely a necessary but also a sufficient condition for securing the right of individuals. This is the case, because the state constitutes its subjects standing as persons with equal rights of independence. Consequently, when Kant in the Second Definitive Article in "Perpetual Peace" speaks of a federalism of free states, he writes that "states ... already have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concept of right."<sup>13</sup> We attain here a picture as if the individual state's internally rightful condition were a *fait accompli*, which the two other levels of Right must acknowledge and leave as it is.

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<sup>11</sup> Cf. Flikschuh 2010, 469-70.

<sup>12</sup> Cr. Pogge's distinction between legal and moral cosmopolitanism (Pogge 2008, 175).

<sup>13</sup> (PP 8: 356; changes in MM – see B/H, 195f)

## Beyond Domestic Right

13

However, it is clearly unsatisfactory to regard domestic right as conclusive or fully settled independently of international and cosmopolitan Right. It is unsatisfactory, first, because in an interdependent world, we cannot neatly separate the relations a state has to its own subjects and the relations it has to other states, and, second, because a state not only has relations to other states as states but also to their subjects. Kant, of course, acknowledges this. It is the reason for his cosmopolitanism. Thus, he writes that "it has now come so far with the (narrower or wider) community of nations of the earth that a violation of right on *one* place of the earth is felt in *all*," and, thus cosmopolitan right is "a supplement to the unwritten code of the right of a state and the right of nations necessary for the sake of any public human rights [zum öffentlichen Menschenrechte überhaupt] and so for perpetual peace."<sup>14</sup> If cosmopolitan right is necessary for human rights "überhaupt," it makes no sense to regard domestic public right as a *fait accompli*, which already *conclusively* secures and determines the right of individual human beings.

14

Alternatively, perhaps, we could say that the individual states can make rights conclusive for those on their respective territories, while cosmopolitan right secures only the rights of travelers.<sup>15</sup> This would fit Kant's point that "cosmopolitan right shall be limited to conditions of universal *hospitality*," as the "Third Definitive Article for Perpetual Peace" has it (PP 8: 357). There is a dilemma here, however. The dilemma is that while a state in relation to its own people is rightful, in relation to other peoples or states, it is "simply a *power*" (MM 6: 311). In other words, without international and cosmopolitan right, the state in relation to other states and in relation to foreigners has no claim to validity or authority. One might say that this does not affect the state's relation to its own citizens and its ability to secure *their* rights. But consider the paradigmatic case of property rights. A state that grants property rights to its citizen at the same time exclude other states and their citizens from this property.<sup>16</sup> And because a state does this *as a power*, when there is no international and cosmopolitan right, it acts as a unilateral will against foreigners.

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<sup>14</sup> PP 8: 360. transl. revised.

<sup>15</sup> [CHECK Hodgson 2012, 108-9, 124]

<sup>16</sup> Merten Reglitz 2016; Ypi 2012, 297-302.



The only way to avoid this conclusion is to assume that the state's territorial rights can somehow be seen as given.

15

It has been suggested that, in Kant, a state's territory is like a person's body which it does not acquire but which it simply has. And, as a result, the state's territory is not in need of omnilateral authorization.<sup>17</sup> But clearly, we cannot simply treat a state like a natural person with an innate right to freedom. A state is a conventional and legal entity. When Kant accepts the territorial integrity of a state, he does so not because it has "what is required in order to be called a right" but, rather, because it was "taken to be legitimate according to the public opinion of every state at the time" (PP 8: 347). Kant can only speak of a state's territorial possession in this manner, because he regards it as acquired unilaterally and not innately possessed.<sup>18</sup>

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To be sure, Kant does speak of the state as "a trunk [with] its own roots," and "as a moral person" that should not be "made into a thing" (PP 8: 344). But this well-known paragraph from "Perpetual Peace" ends with the admonition that treating a state as a mere thing that can be acquired by another state through inheritance, exchange, purchase or donation has the result that "*the subjects* are thereby used and used up as things to be managed at one's discretion" (PP 8: 344, emphasis added). Thus, the moral issue is in the final analysis how individual human beings are treated and is thus not a denial of moral individualism.

17

The most plausible Kantian argument for states' rights (to territorial integrity) would be to derive it from individuals' right to freedom. Thus, one commentator writes, "an individual can only be truly independent from the choices of others if the agent that secures her independence is itself independent. In other words, to be genuine, independence must go *all the way up*. A state can thus only perform its function if it is entitled to the same kind of independence as are its citizens."<sup>19</sup> In relation to possession, this means that a state can only make its citizens' property rights conclusive, if its own territorial integrity is secure.<sup>20</sup> If we want to stay true to the fundamental idea of Kant's notion of Right, we must be careful not to make this argument into an empirical one. There is a danger that we have a normative argument for the rightful relationship between the state and its subjects – based on

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<sup>17</sup> Ripstein 2009, 228.

<sup>18</sup> Ypi 2012, 304.

<sup>19</sup> Hodgson 2012, 114.

<sup>20</sup> Hodgson 2012, 116.

UPR and freedom as independence – and a merely functional argument that says that the state to serve its function in relation to its citizens must have territorial integrity. In that case, there is a moral argument for territorial integrity but it is only directed to the subjects of the separate states seen in isolation from one another. The argument the state can give to other states and their citizens for its territorial rights and its exclusion of them from their territory can only be a functional or derivative one: it is functionally necessary for each state to have an independent territory to secure their respective citizens' (property) rights.

18

The interpretation under consideration implies that the only purpose of international right is to secure and maintain existing boundaries between territorial states – or more precisely, to protect the territorial integrity of internally legitimate states.<sup>21</sup> In this way, international right comes after, and is secondary to, domestic right and simply makes the independence of the agents (the states) that protect the independence of human beings a matter of lawful arbitration rather than force or war. For the states, international right has a normative dimension as securing their freedom as independence. But for the individuals, experiencing the coercion to which they are subject in relation to foreign states, there is no normative justification of positive right. It stands for them as mere force. Thus, it is a shortcoming of this interpretation that it only gives a justification of states' rights from the perspective of the members of the state and not to outsiders. This ignores the cosmopolitan condition in which “a violation of right on *one* place of the earth is felt in *all*” (PP 8: 360).

Kant's claim that “a violation of right on *one* place of the earth is felt in *all*” is a favorite among contemporary cosmopolitans,<sup>22</sup> but what exactly does it mean? By a violation of right, Kant must mean a violation of the UPR and the innate right to freedom, that is, a violation of the right of each individual to a secure and equal domain of external freedom-as-independence. Thus, when I feel a violation of right on another place of the earth, this is not because of some affective relation to other people, but because our enjoyment of external freedom is mutually dependent. A violation of the right to freedom-as-independence on one place of the earth is felt in all, when human beings are so interdependent that my enjoyment of this right can only be secure when I stand in law-governed relations with them.

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<sup>21</sup> This last clarification is important to understand, for example, Anna Stilz' (2011) Kantian argument for territorial rights.

<sup>22</sup> See e.g. Nussbaum 1997, 25.

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Still, Kant clearly does regard state sovereignty as important. One reason for this is that he regards it as contradictory for a state to submit to a coercive global order, because a state is defined by being a supreme authority (PP 8: 354). Another reason that has been suggested is that state sovereignty is important because of the respect it shows for the autonomy and self-determination of its members.<sup>23</sup> The state as a rightful condition is a collective achievement of its members and to respect their autonomy, other states should not force them to join juridical-political relations with them. To this argument, we can reply, first, that even if states should not be forced against their will to join global juridical relations, this does not imply that states ought not (freely) enter such relations.<sup>24</sup> Second, the argument for state sovereignty based on respect for the self-determination of its members assumes that only the internal perspective of members matters and ignores the effects of state sovereignty and territorial jurisdiction on non-members.

## Concluding reflections

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In Kant, the tension between respect for the equal freedom of individual human beings and respect for the independence of individual states has not been fully solved. In our day, more than two hundred years later, the same tension is still with us, and is the source of some of our most difficult normative questions, from issues of humanitarian intervention to issues of immigration and the proper form and powers of international organizations. Part of the reason for the tension is that many regard the sovereign state as the most successful political entity for providing for the rights of human beings. At the same time, we know that states are also gross violators of human rights and that many issues of Right in an interdependent world as ours cannot be solved without international and global agreements and institutions.<sup>25</sup>

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The value of Kant's political and legal writings in this connection is the focus he sets on freedom as independence and the establishment of a common or omnilateral will. Kant's argument for domestic legal order is that it is necessary for overcoming the unilaterality of private decisions. The legal procedures of the state overcomes unilaterality by establishing a common and public will that has no purposes of its

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<sup>23</sup> Kleingeld 2004, 309-11, Stilz 2011, 593-7.

<sup>24</sup> Pogge 2009, 200.

<sup>25</sup> Cf. Williams 2014, 17.

own but exists only for the sake of maintaining a rightful condition of equal freedom for its members. Things look differently at the international level. Since (or insofar as) the individual states are already rightful conditions with no purpose other than establishing a rightful condition, a state is disanalogous with an individual who has purposes of his own. However, seen from the global perspective, the state is still a unilateral will when it enforces its right to territory (and its inhabitants property rights) vis-à-vis other states and their citizens. This is Kant's conundrum, and it is the reason why he says states have "outgrown the constraint of others..." (PP 8: 355-6). In other words, the problem is that Kant on the one hand has described the state as possessing an omnilateral will with no purposes of its own and on the other hand cannot deny that from an international and a cosmopolitan perspective, it must be regarded as merely a particular will.

22

If we are to go beyond the conflict between the rights of individuals and the rights of states, we must acknowledge that the sovereign state is not the final answer to how to secure the rights of individuals. If we are to be true to the fundamental principles of Kant's Philosophy of Right, we should not treat the sovereign state as capable of establishing conclusive rights for its members. This form of sovereign decision-making will affect not only members but also non-members who will be subject to a mere power or to a unilateral will, which is incompatible with their (the non-members') freedom-as-independence. If Kant's system of Right – and our system of Right – is to attain unity at the global level, it cannot give equal weight to the rights of individuals on the one side and the right of states on the other side. It must be based on the equal freedom of individual human beings as its core principle.

23

However, the conclusion that the system of Right can only attain unity if all three levels in the end are based on a shared principle of equal freedom for individuals, this should not be understood, as an argument in favor of seeing legal cosmopolitanism as in the end derived from moral cosmopolitanism. We would fail to acknowledge one of the central insights of Kant's philosophy of Right, if we saw political-legal institutions as mere instruments for realizing a moral ideal. A public legal order is not a mere instrument for realizing a pre-conceived principle, viz. the principle of equal freedom. Rather, we can only fully conceive of the idea of freedom-as-independence with or through a notion of public law. Kant scholars have discussed this in relation to domestic law.<sup>26</sup> However, domestic public law

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<sup>26</sup> Ripstein 2009; Rostbøll, 2016; 2017; Zylberman 2016.

constitutes only relations of equal freedom for members and hence can provide a justification only internally or domestically. Insofar as people affect one another across state borders, a freedom argument for public law and political institutions must extend to the global level. The challenge for Kantians is to develop the idea of the constitutive relationship between public law and external freedom of human beings beyond the internal organization of individual states to the global level. How can we secure for each citizen of the world a status as a bearer of rights on equal terms with any other member of humanity? This would require a legally established peace that provides assurance of the conclusiveness of the rights of independence of individuals. That is why perpetual peace is "the entire final end of the doctrine of right" and "the highest political good."